

**STATE OF MICHIGAN
COURT OF APPEALS**

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALVIN AVANN ROGERS,

Defendant-Appellant.

UNPUBLISHED

May 12, 2005

No. 251412

Saginaw Circuit Court

LC No. 03-022782 FC

Before: Murphy, P.J., and White and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529, criminal sexual conduct in the first degree (CSC I), MCL 750.520b, and criminal sexual conduct in the second degree (CSC II), MCL 750.520c. He was sentenced as a second habitual offender, MCL 769.10, to concurrent terms of thirty-eight to sixty years' imprisonment for both the armed robbery and CSC I convictions, along with a concurrent term of fourteen to twenty-two years' imprisonment for the CSC II conviction. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(A) and (E).

Defendant's sole argument on appeal is that his counsel, by failing to object to the scoring of offense variable (OV) 7, MCL 777.37, at fifty points, provided him with ineffective assistance of counsel. We disagree. Counsel's performance was not deficient, nor was defendant prejudiced. See *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

MCL 777.37(1)(a) provides that a score of fifty points is proper where a defendant treats the victim "with sadism, torture, or excessive brutality, or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." When scoring offense variables, "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Furthermore, this Court will uphold "[s]coring decisions for which there is any evidence in support" *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

The record supports the trial court's scoring of OV 7. The victim was forced at knifepoint down an alley to a dark location, where defendant, after first degradingly questioning and taunting her about anal sex, twice sodomized the victim, stole her money, uttered profanities directed at her, and then left the scene, ordering the victim to remain at the locale in a bent-over position. At the time defendant initially grabbed the victim, she was headed to work, and

defendant took hold of her hair and the hood of her coat from behind, while threatening to “slice and dice” her if she disobeyed. Medical testimony revealed that the victim suffered two lacerations to her rectum; one small cut and one deep laceration. There was also evidence regarding feces being discovered by the victim on her person following the assault and fecal matter found at the crime scene. Defendant confessed to the robbery and to using a box cutter to perpetrate the crime. He also told police that he placed the handle of the box cutter in the victim’s rectum. Regardless of whether defendant’s actions constituted sadism and torture, which is certainly arguable, they clearly provide evidence to support a finding that defendant acted with excessive brutality and engaged in conduct designed to substantially increase the fear and anxiety the victim suffered during the offense. An objection to the trial court’s scoring of fifty points for OV 7 would have been meritless, and counsel is not required to make frivolous objections to the scoring of offense variables. *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Michael R. Smolenski